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ANTHONY GOH KHIOK LOONG

v.

CHAN YAM HENG & ANOR

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HIGH COURT SABAH & SARAWAK, KUCHING
CLEMENT SKINNER J
[CIVIL APPEAL NO: 12-16-2006-I]
15 SEPTEMBER 2006

C ***CIVIL PROCEDURE:*** *Judgments and orders - Setting aside - Appeal against - Delay in making application to set aside interlocutory judgment - Whether acceptable explanation given - Subordinate Courts Rules 1980, O. 29 r. 14 - Whether defendants could rely on O. 62 r. 13 Rules of the High Court 1980 - Whether service of interlocutory judgment on*
D *defendants good and effective - Whether sessions judge erred*

This was an appeal by the plaintiff against the decision of the Sessions Court Judge who had allowed the first and second defendant's application to set aside an interlocutory judgment that
E was entered against them in default. The facts were that the plaintiff (an infant) was in a car that was involved in an accident with a lorry owned by the second defendant and driven by the first defendant. The plaintiff sustained bodily injuries and through his lawyers wrote to the defendants demanding the payment of
F compensation in respect of the injuries suffered. The plaintiff commenced this action at the Sessions Court and the first and second defendants were personally served with the summons. When the defendants nor their lawyers appeared on the return date fixed for the hearing of the summons, the Sessions Judge
G granted interlocutory judgment against the defendants. On 9 December 2005, the defendants applied to set aside the interlocutory judgment entered against them. The defendants also applied (in their first prayer) that they be granted leave to file an application to set aside the interlocutory judgment entered against
H them. The Sessions Judge allowed the application and hence this appeal.

Held (allowing the appeal):

I **(1)** The Sessions Judge had erred when she agreed with the defendants' contention that even though their application did not specifically apply for an extension of time to file their application, the first prayer of their application would suffice for that purpose. This reasoning could not be supported. The

defendants had applied for 'leave to file the application' simpliciter, which meant nothing, since the Subordinate Courts Rules ('SCR') did not require the defendants to obtain any form of leave before they can file an application under O. 29 r. 14 SCR. But if they were out of time in doing so, then they should apply for extension of time to do so which they clearly did not do. (para 8)

(2) The defendants here, never having appeared in person, could not rely on O. 62 r. 13 Rules of the High Court 1980 (RHC). Accordingly, the service of the interlocutory judgment personally on the defendants was good and effective to inform them of the judgment obtained against them and any application to set aside such judgment would have to be applied for within the time prescribed by O. 29 r. 14 SCR, unless extended by the court, neither of which was done in this case. (para 19)

(3) The Sessions Judge had erred in considering the merits of the application and in setting aside the interlocutory judgment. Once the Sessions Judge had arrived at a finding that the defendants' application was out of time and no acceptable explanation had been given for the delay in making the application to set aside the interlocutory judgment, it was not open to the Sessions Judge to consider the merits of the application. (paras 24 & 25)

Case(s) referred to:

C Paul D'Cruz v. Chow Tai You & Sons Sdn Bhd [1998] 4 CLJ Supp 389 HC ***(refd)***

Fira Development Sdn Bhd v. Goldwin Sdn Bhd [1989] 1 CLJ 1; [1989] 1 CLJ (Rep) 32 SC ***(refd)***

Khor Cheng Wah v. Sungei Way Leasing Sdn Bhd [1997] 1 CLJ 396 ***(refd)***

Malayan United Bank Bhd v. Mohamed Salleh Mohamed Yusoff & Ors [1988] 2 CLJ 460; [1988] 1 CLJ (Rep) 762 HC ***(refd)***

Mokhtar Amin v. Mohamed Mokhtar Omar [2001] 4 CLJ 489 CA ***(dist)***

Ng Han Seng & Ors v. Scotch Leasing Sdn Bhd [2003] 4 CLJ 533 CA ***(foll)***

OCBC Bank (M) Bhd & Anor v. Livison Sdn Bhd & Ors [2001] 5 CLJ 433 ***(refd)***

Legislation referred to:

Road Transport Act 1987, s. 96(2)

Rules of the High Court 1980, O. 42 r. 13, O. 62 r. 13

Subordinate Courts Rules 1980, O. 1 r. 4, O. 29 r. 14

For the appellant - Shankar Ram; M/s Thomas Shankar Ram & Co
For the respondents - Charles Antau; M/s Tang & Antau Co

Reported by Suhainah Wahiduddin

JUDGMENT

Clement Skinner J:

[1] This is the hearing of an appeal brought by the plaintiff in the court below, against the decision of the learned Sessions Court Judge who, on 7 April 2006, allowed the 1st and 2nd defendant's application to set aside an interlocutory judgment that was entered against them in default. For convenience I shall continue to refer to the appellant and respondents in this appeal as the plaintiff and defendants respectively.

[2] The brief facts leading up to this appeal are these. The plaintiff (an infant) sues by his father and next friend. On 28 January 2002 the plaintiff was travelling in a motor vehicle driven by his father, when the car was involved in an accident with a lorry owned by the 2nd defendant and driven by the 1st defendant. The plaintiff sustained bodily injuries as a result of the accident. On 25 November 2004 the plaintiff, through his lawyers, wrote to the defendants demanding the payment of compensation in respect of the injuries he suffered. By the same letter, the insurers of the 1st defendant's lorry, namely AXA Affin Assurance Bhd (hereafter 'AXA Affin') were given notice pursuant to s. 96(2) of the Road Transport Act 1987 of the plaintiff's intention to commence legal proceedings against their insured.

[3] On 10 December 2004 the plaintiff commenced this action at the Sessions Court, Kuching. The 1st defendant was personally served with the summons on 12 January 2005 while the 2nd defendant was personally served with the summons on 11 January 2005. According to the affidavit of the 1st defendant Chan Yam Heng, (affirmed on 5 December 2005 on his own behalf as well as on behalf of the 2nd defendant), upon being served he contacted the insurers AXA Affin and was 'told that they will appoint a solicitor to attend to the matter'. The 1st defendant affirmed in the same affidavit that he was contacted by the legal firm of M/s Tang & Antau Co., informing him that the legal firm had been appointed by the insurers to act on behalf of the defendants. On 1 April 2005 the defendants' lawyers wrote to the

plaintiff's advocates informing the latter of the former's appointment to act on behalf of the defendants and to forward all correspondence to them.

[4] When the defendants nor their lawyers appeared on the return date fixed for the hearing of the summons, the Sessions Judge granted interlocutory judgment against the defendants with damages to be assessed on a date to be fixed by the court.

[5] The interlocutory judgment was then personally served on 1st defendant on 10 May 2005, and on the 2nd defendant on 9 May 2005. The court then fixed 15 December 2005 for damages to be assessed. On 9 December 2005 the defendants applied to set aside the interlocutory judgment entered against them. The defendants also applied (in their first prayer) that they 'be granted leave to file an application to set aside the interlocutory judgment entered' against them.

[6] In allowing the application, the learned Sessions Judge gave written grounds for her decision. A reading of her decision shows:

(a) that she found the interlocutory judgment to be a regular judgment. On the facts before me, I find that she was correct in this part of her decision. Counsel for the defendant also conceded before me that the judgment was a regular judgment;

(b) that by O. 29 r. 14 Subordinate Courts Rules ('SCR'), an application to set aside a judgment that was entered in default must be made within 30 days of the receipt of the order or judgment to be set aside. The learned Sessions Judge found that the defendant's application to set aside was made well outside the prescribed period, in that, it was filed some seven months after the interlocutory judgment was served on the defendants.

On this part of the case the plaintiff took two points before the learned Sessions Judge, namely (i) that the defendants had not applied to extend the time to file their application to set aside, and, (ii) there was no acceptable explanation for the delay in making the application.

[7] With regard to the first point the defendants contended that even though their application did not specifically apply for an extension of time to file their application, the first prayer of their application would suffice for that purpose. The learned Sessions Judge agreed with the defendants' submission and held:

> Although the application does not specifically contain a prayer for leave to extend the time for the filing of the application, it has nevertheless prayed for leave to file the application, which, if granted by the court, has, in my view, the effect of granting the extension of time to the defendants to file the application.

[8] I find that the learned Sessions Judge erred in this finding. Her reasoning cannot be supported. The defendants had applied for 'leave to file the application' simpliciter, which, in my view, means nothing, since the SCR does not require the defendants to obtain any form of leave before they can file an application under O. 29 r. 14 SCR. But if they are out of time in doing so, then they should apply for extension of time to do so which, they clearly did not do. The worthlessness of the plaintiff's first prayer becomes apparent when it is considered that even if the defendants' first prayer was granted in terms, it would still not have the effect of extending time to the defendants to make the application for the simple reason that no extension of time was applied for.

[9] With regard to the second point ie, that no reasonable explanation had been offered by the defendants for the delay in making the application, the defendants had offered two explanations before the learned Sessions Judge for the delay. The first explanation was that upon being served the summons they duly informed their insurers who informed them that a solicitor would be appointed to act for them, following which Messrs Tang & Antau Co. Advocates contacted the 1st defendant to inform him that they had been appointed by the insurers to act on behalf of the defendants. However, according to the 1st defendant 'due to the insurers appointing Messrs Tang & Antau Co. Advocates at the last moment and further due to unforseen circumstances', interlocutory judgment was entered against the defendants.

[10] The second explanation was that the plaintiff's lawyers had tried to steal a march on the defendants by serving the interlocutory judgment personally on the defendants instead of their Advocates Messrs Tang & Antau Co. despite the defendants'

lawyers having, by their letter of 1 April 2005 informed the plaintiff's lawyer that they (Messrs Tang & Antau Co.) had been appointed to act for the defendants and to forward all correspondence to them. Accordingly, the defendants contended that their lawyers Messrs Tang & Antau Co. only came to know of the interlocutory judgment on 11 November 2005 when the insurers forwarded the same to them, after which the application to set aside was immediately prepared, but the affidavit in support could only be affirmed on 5 December 2005 because the 1st defendant, a lorry driver, was travelling. Based on the foregoing explanation, the defendants contended that since the interlocutory judgment was never served on their advocates on record, which should have been done pursuant to O. 62 r. 13 RHC, which rule would apply to the Subordinate Court by virtue of O. 1 r. 4 of the SCR (since there is no equivalent in the SCR), the 30 days had not begun to run and so their application was well within the time allowed under the rules.

[11] Before the learned Sessions Judge and before me as well, the plaintiff sought to counter the arguments advanced by the defendants by pointing out that the defendants were not candid in their explanation, in that, they blamed the insurers for appointing Messrs Tang & Antau Co. 'at the last moment', but this could not be true because it is evident from a letter dated 31 March 2005 written by the insurers to Messrs Tang & Antau Co. that the legal firm received the insurers' letter on 4 April 2005, which is a date well before the return date for the summons. (See exh. 'CYH1' annexed to the affidavit of the 1st defendant affirmed on 5 December 2005 in support to the defendants' application to set aside).

[12] In response to the point that the plaintiff had served the interlocutory judgment on the defendants personally instead of their lawyer, the plaintiff drew attention to the fact that Messrs Tang & Antau Co.'s letter of 1 April 2005 was exhibited as 'CYH2' to the affidavit of Chan Yam Heng affirmed on 26 January 2006 and that the letter 'CYH2' bears a reference 'EJ/CV/SC/(K)/05(295)-AXA'. According to the plaintiff the initials 'EJ' refers to Mr. Edward Moal Juga the advocate having charge of the matter but who, at all material times, was not issued with a practising certificate in the years 2004 and 2005, under s. 9 of the Sarawak Advocates' Ordinance (Cap 110), and, was at all

material times an undischarged bankrupt. Accordingly, it was the plaintiff's contention before the learned Sessions Judge that his lawyers were not obliged to comply with Messrs Tang & Antau Co.'s letter of 1 April 2005. It should be noted that the plaintiff's allegations about Mr. Juga not possessing a practising certificate and being a bankrupt at all relevant times, are made in para. 3 of Goh Kok Hua's affidavit in opposition No. 2 affirmed on 9 February 2006. These allegations are not denied by the defendants who confirm that Mr. Juga is an undischarged bankrupt. As far as his right to practice is concerned, the registrar of the High Court, Kuching has confirmed in writing that Mr. Juga was not issued a practising certificate in 2004 or 2005. (See exh. 'AG5' of Goh Kok Hua'a affidavit affirmed on 17 January 2006). The defendants tried to explain, however, that Mr. Juga was not in the employ of Messrs Tang & Antau Co. but of a firm known as Tang, Antau, Juga and Jarau which was taken over by Messrs Tang & Antau Co. (Kuching) some time in July 2005.

[13] On the facts before her, the learned Sessions Judge rejected the explanation for the defendants' delay in applying to set aside the interlocutory judgment.

[14] With regard to the defendants' explanation that Mr. Edward Juga was not employed by Messrs Tang & Antau Co. (Kuching), the learned Sessions Judge found no truth in the contention and said (at p. 7 of her decision):

> (... in my view, [this] is not true judging from the letter head of Tang & Antau Co., Advocates' letters marked CYH4 (dated 22.7.2005) and CYH5 (dated 29.9.2005) which show that Edward Juga was an advocate in Tang & Antau Co. Advocates. Further, "EJ" appearing in "Our Reference" of the said two letters presumably refers to Edward Juga).

[15] With regard to the defendants' contention that the plaintiff's lawyer had tried to steal a march on the defendants by serving the interlocutory judgment on them instead of their advocate as requested, the learned Sessions Judge rejected this argument and said (at p. 9 of her decision):

> I fully agree with the Plaintiff that Mr. Edward Juga, being an undischarged bankrupt and not being issued with a practicing certificate, ought not to have acted for the defendants. Any dealings with him would be void ab initio. Hence, the plaintiff's solicitors are justified not to deal with him.

Reading from paragraph 3 of the Affidavit in Opposition No. 2 affirmed by Goh Kok Hua affirmed on 9.2.2006, it appears the reasons why the Plaintiff solicitors did not response to CYH-1 was not only because Mr Edward Juga did not have a practicing certificate, but also because he was an undischarged bankrupt. I therefore do not agree that the Plaintiff solicitors were trying to steal 'a march on the defendants' by not serving the interlocutory judgement on the defendants even before they have received the registrar's letter ie, AG-5.

It is a cardinal principle of law that when a litigant seeks the intervention of the court in a matter that affects his rights, he must do so timeously. In all cases in which delay in approaching the court is in issue, the burden is upon the litigant who has delayed to render a satisfactory explanation for it. Whether the explanation in a given case is satisfactory or reasonable depends upon the facts and circumstances of each case. And in a matter which involves the exercise of discretion, it is for the judge in whom the law primarily vests the discretion. (See *Kho Cheng Wah v. Sungai Way Leasing* [1996] 1 MLJ 223).

On my part, I find a delay of six months is substantial delay in respect of which, I regret to say, the defendants have not advanced a satisfactory explanation.

[16] Pausing here for one moment, I fully agree with the findings arrived at by the learned Sessions Judge and her reasons for rejecting the explanation offered by the defendants. On my part, with regard to the first explanation offered by the defendants, I find a distinct lack of candour on the defendants' part in trying to blame the insurers for appointing the legal firm of Messrs Tang & Antau Co. 'at the last moment'. There can be no truth in this allegation for two reasons: First, Messrs Tang & Antau Co. received the insurers' instructions on 4 April 2005 which was four days before the return date fixed for the hearing of the summons; and secondly, no one from Messrs Tang & Antau Co. has come forward to say the firm was instructed too late to be able to appear on 8 April 2005 or why they could not do so.

[17] The defendants' further lack of candour can be seen from their assertion that the interlocutory judgment was entered against them 'due to unforseen circumstances'. The defendants are not being forthright with the court nor of any assistance to the court when they refuse to inform the court what those 'unforseen circumstances' were. In a case such as this where the defendants

A are relying on the court to exercise discretion in their favour, they cannot expect a favourable exercise of discretion if they themselves are not candid with the court or are not willing to place all relevant material before the court to assist the court in the exercise of its discretion.

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[18] With regard to the second explanation, quite apart from agreeing with the learned Sessions Judge's reasons for rejecting this explanation, Mr. Charles Antau who appeared to argue the appeal on behalf of the defendants very properly, on being asked C by the court, admitted that the letter of 1 April 2005 ('CYH2') was signed by Mr. Edward Juga, a person who at that material time was not authorised to practice as an advocate.

[19] During submissions before me counsel for the defendants, D relying on O. 62 r. 13 RHC, contended that the 30 days period under O. 29 r. 14 SCR had not even begun to run as the interlocutory judgment had not been served on the defendants' advocates. With all respect, I do not think O. 62 r. 13 is of any assistance to the defendants here nor has it any application to the facts of this case. Order 62 r. 13 is meant to apply in a situation E where a party has either sued or appeared in person and then appoints a solicitor to act for him and gives notice to the opposite party of such fact, which is not the case here. This is made plain from the opening words of O. 62 r. 13 which states very clearly that: 'Where a party after having sued or appeared in person has F given notice in writing to the opposite party ...'. The defendants here, never having appeared in person cannot rely on this rule. Accordingly, the service of the interlocutory judgment personally on the defendants was good and effective to inform them of the judgment obtained against them and any application to set aside G such judgment would have to be applied for within the time prescribed by O. 29 r. 14 SCR, unless extended by the court, neither of which was done in this case.

[20] In support of their arguments based on O. 62 r. 13, the H defendants also referred me to the decision in *Mokhtar bin Amin v. Mohamed Mokhtar bin Omar* [2001] 4 CLJ 489 but I do not find that case of any assistance to the defendants here. That case is clearly distinguishable on its facts. In the first place that case did not concern O. 62 r. 13. Secondly, in that case, unlike here, I before the filing of the suit in which the judgment in default was obtained, the plaintiff and defendant were already involved in

proceedings to remove a caveat concerning the same piece of land, which was the subject matter of the suit, and in the caveat proceedings both parties were represented by solicitors. The plaintiff there, despite being aware that the defendant was represented by solicitors and that the caveat proceedings were on foot, proceeded to serve the defendant personally. In those circumstances, it was held that the plaintiff had served the defendant personally in order to steal a march on him which, the learned Sessions Judge found, was not the case here.

[21] However, despite her finding that the defendants had not offered an acceptable explanation for their delay in applying to set aside the interlocutory judgment within 30 days of the service of the same on them, the learned Sessions Judge still went on to consider the merits of the application and set aside the interlocutory judgment for the sole reason that the defendants had a defence on the merits.

[22] I find the learned Sessions Judge had erred in doing so. Once the learned Sessions Judge had arrived at a finding that the defendants' application was out of time and no acceptable explanation had been given for the delay in making the application, it was not open to her to consider the merits of the application. Authority for this proposition is the decision of the Court of Appeal in *Ng Han Seng & Ors v. Scotch Leasing Sdn Bhd* [2003] 4 CLJ 533, which was a case concerning an application to set aside a judgment in default of appearance entered against the appellants there under the Rules of the High Court ('the RHC'), but which was made outside the 30 days allowed by O. 42 r. 13 RHC (which is the equivalent of O. 29 r. 14 SCR). It was held by the Court of Appeal (per Nik Hashim JCA) at p. 536 that:

> From the record, the JID was not irregular in any way. However, the appellants' application did not comply with O. 42 r. 13 of the Rules of the High Court 1980 which requires that a party intending to set aside a judgment must make his application to the court and serve it on the party who has obtained the judgment within 30 days after the receipt of the judgment by him. In the present case the 1st and 3rd appellants were two months outside the time allowed whereas the 2nd appellant was seven months. Further, there was no explanation whatsoever from the appellants for their delay in approaching the court and that they had not prayed for extension of time to make their applications. In these circumstances, there was clearly no need for the merits of the

A appellants' application to be considered and in fact they should be dismissed in limine (See *Koperasi Belia Nasional Bhd v. Storage Enterprise (Port Kelang) Sdn Bhd* [1998] 3 CLJ 335; *Khor Cheng Wah v. Sungai Way Leasing Sdn Bhd* [1997] 1 CLJ 396; *Abdul Latif bin Mohd. Ibrahim v. International Factors Leasing Pte Ltd* [2001] 2 CLJ 140).

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[23] Despite the clear pronouncement of the Court of Appeal on the matter it was submitted on behalf of the defendants that delay alone cannot justify the dismissal of an application to set aside a judgment in default and that the court must consider the merits C of the application. I do not agree. In the light of the requirement in O. 29 r. 14 SCR which was introduced into the rules in 1993, that the application to set aside must be made within 30 days, it would be wrong for the court to ignore that rule and go straight into the merits of an application. Further the submission is D squarely against the decision in *Ng Han Seng & Ors v. Scotch Leasing Sdn Bhd (supra)*. Such an approach would also be inconsistent with that part of the decision in *Khor Cheng Wah v. Sungei Way Leasing Sdn Bhd* [1997] 1 CLJ 396 where the Court of Appeal said (per Gopal Sri Ram JCA):

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> Even in cases where a right is exercisable *ex debito justitiae*, a court may refuse relief to an indolent litigant.

[24] To me, what was said there is applicable with even more force in a case such as this, where the defendants' right to set F aside the interlocutory judgment is not exercisable *ex debito justitiae*, and the learned Sessions Judge had rejected their explanation for the delay. On the facts and circumstances disclosed to the court, clearly the defendants here were indolent. I use the word indolent advisedly because while I am aware that in *Khor Cheng Wah*'s case G it was said that a court 'will not, whenever feasibly, allow a client to suffer for the negligence of his solicitor', the Court of Appeal did go on to say that 'there are limits to what may be done in the interests of justice' which, as the Court of Appeal went on to point out, 'is not only for a defaulting defendant: it is for the H plaintiff as well'. An examination of the facts here shows that after informing the insurers upon their being served, the defendants did not say that they did anything further to communicate with their insurers or their lawyers to discover the state of the litigation against them or even what they did after being served with the I interlocutory judgment. In the absence of any such information or explanation it would be wrong to visit the consequences of the defendants' indifference on the plaintiff's head.

[25] Counsel for the defendants also referred me to several case authorities in support of his submission that notwithstanding delay, the court must consider the merits of the application. I was referred to three High Court decisions, namely, *OCBC Bank (M) Bhd & Anor v. Livison Sdn Bhd & Ors* [2001] 5 CLJ 433; *Malayan United Bank Bhd v. Mohamed Salleh bin Mohamed Yusoff & Ors* [1988] 2 CLJ 460; [1988] 1 CLJ (Rep) 762; and *C. Paul D'Cruz v. Chow Tai You & Sons Sdn Bhd* [1998] 4 CLJ Supp 389. With all respect, not only do I prefer the views expressed on the point by the Court of Appeal in *Ng Han Seng & Ors v. Scotch Leasing Sdn Bhd*, I am also bound by that decision.

[26] I was also referred to *Fira Development Sdn Bhd v. Goldwin Sdn Bhd* [1989] 1 CLJ 1; [1989] 1 CLJ (Rep) 32 which is a decision of the then Supreme Court but I would point out that that case was decided before the Subordinate Courts Rules were amended in 1993 by PU (A) 1 93/93, to including O. 29 r. 14. Accordingly in my view, the decision in *Ng Han Seng & Ors v. Scotch Leasing Sdn Bhd* is still the decision I should follow on the particular point.

[27] For all the above reasons I allow the appeal with costs.